Supreme Court, U.S.
FILED
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No. 97-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

CARTER G. PHILLIPS*
DAVID W. CARPENTER
THOMAS W. MERRILL
PETER D. KEISLER
SUSAN M. DAVIES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

MARC E. MANLY
EDWARD R. BARILLARI
AT&T Corp.
150 Allen Road
Liberty Corner, NJ 07938
(908) 903-6014
Counsel for Petitioner

BRUCE M. HALL*
BRAD T. SUMMERS
SARAH J. RYAN
BALL JANIK LLP
101 S.W. Main Street
Suite 1100
Portland, OR 97204
(503) 228-2525
Counsel for Respondent

J. RICHARD URRUTIA
JAMES, DENECKE & HARRIS
1150 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204
(503) 228-7967
Co-Counsel for Respondent

* *Counsel of Record*

PETITION FOR CERTIORARI FILED OCTOBER 16, 1997
CERTIORARI GRANTED DECEMBER 12, 1997

83 pp

TABLE OF CONTENTS

Relevant Docket Entries in the United States Court of Appeals for the Ninth Circuit 1

Relevant Docket Entries in the United States District Court for the District of Oregon 3

COT's Amended and Supplemental Complaint for Treble Damages Under the Antitrust Laws, and Related Statutory and Common Law Claims (June 29, 1992) 19

Plaintiff's FRCP 15 Motion to Amend Its Second Amended Complaint to Add Claims Under the Federal Communications Act of 1934 (October 22, 1993) 37

Pretrial Order (June 3, 1994) 38

Transcript of Trial - Testimony of Spencer Perry (June 13, 1994) 54

Transcript of Trial - Testimony of Michael Keith (June 13, 1994) 56

Transcript of Trial - Testimony of Maggie Brennan-Lasard (June 15, 1994) 59

Plaintiff's Renewed Motion to Admit Evidence of AT&T's Financial Condition (June 17, 1994) 62

Defendant's Amended Requested Jury Instruction No. 28 (June 23, 1994) 65

Transcript of Trial - Jury Instructions (June 24, 1994) ... 66

Transcript of Trial - Exceptions to Jury Instructions (June 24, 1994) 76

Verdict (June 29, 1994) 77

Supreme Court Order Granting Writ of Certiorari 79

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the District of Oregon dated November 9, 1994 ..... 31a

Order of the United States District Court for the District of Oregon dated November 9, 1994 ..... 46a

Amended Judgment of the United States District Court for the District of Oregon dated November 9, 1994 .... 47a

Opinion of the United States Court of Appeals for the Ninth Circuit dated February 26, 1997 ..... 1a

Rehearing Denial by the United States Court of Appeals for the Ninth Circuit dated July 18, 1997 ..... 49a

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 94-36116 Filed: 11/21/94
Nsuit: 3410 Antitrust (Fed)
Central Office Tele., et al v. American Telephone
Appeal from: District of Oregon (Portland)

* * *

11/21/94 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting schedule as follows: CADS due 12/5/94; appellant's designation of RT is due 11/21/94; appellee's designation of RT is due 11/30/94; appellant shall order transcript by 12/12/94; court reporter shall file transcript in DC by 1/10/95; certificate of record shall be filed by 1/17/95; appellant's opening brief is due 2/27/95; appellees' brief is due 3/28/95; appellants' reply brief if any is due within 14 days of service of answering brief. [94-36116] (hh) [94-36116]

12/1/94 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting cross appeal briefing schedule as follows: CADS due 12/15/94; appellant's designation of RT is due 12/1/94; appellee's designation of RT is due 12/12/94; appellant shall order transcript by 12/21/94; court reporter shall file transcript in DC by 1/23/95; certificate of record shall be filed by 1/30/95; first cross-appeal brief is due 2/27/95 for defendant; second cross-appeal brief is due 4/10/95 for plaintiff; third cross-appeal brief is due 5/10/95

for defendant; optional cross-appeal reply brief is due 5/24/95 for plaintiff. [94-36156, 94-36116] (hh) [94-36116 94-36156]

2/26/97 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Warren J. FERGUSON; Melvin BRUNETTI, dissenting; Samuel P. King, author.) (4.5 memo sent to Senior judge WJF) FILED AND ENTERED JUDGMENT. [94-36116, 94-36156] (mhf) [94-36116 94-36156]

3/19/97 Filed original and 40 copies Aplt/Cross Aple American Telephone in petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 3/18/97 (PANEL & all active judges) [94-36116, 94-36156] (mhf) [94-36116 94-36156]

7/18/97 Filed order (Warren J. FERGUSON, Melvin BRUNETTI, Samuel P. King,): The pet for rhrg is DENIED & the suggestion for rhrg en banc is REJECTED. in 94-36156 [94-36116, 94-36156] (mhf) [94-36116 94-36156]

7/29/97 MANDATE ISSUED [94-36116, 94-36156] (mhf) [94-36116 94-36156]

U.S. District Court
U.S. District Court for the District of Oregon (Portland)

CIVIL DOCKET FOR CASE #: 91-CV-1236

Central Office Tele v. American Telephone &
Assigned to: Judge John Jelderks Filed: 11/27/91
Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 410
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 15:2 Antitrust Litigation

* * *

1 11/27/91 COMPLAINT-receipt #102290 (tely) [Entry date 12/02/91]

37 06/29/92 AMENDED & SUPPLEMENTAL complaint [1-1] (tely) [Entry date 06/30/92]

55 11/20/92 ANSWER to amended & supplemental complaint [37-1] and COUNTER-CLAIM by Defendant American Telephone & against Plaintiff Central Office Tele (tely) [Entry date 11/23/92]

56 12/10/92 AMENDED ANSWER by Defendant American Telephone & Telegraph [55-1] (tely) [Entry date 12/11/92]

56 12/10/92 AMENDED COUNTER-CLAIM [55-2] by American Telephone & Telegraph (tely) [Entry date 12/11/92]

57 12/10/92 REPLY by Plaintiff Central Office Telephone to Deft's 1st affirmative defense & counterclaim [55-2] (tely) [Entry date 12/11/92]

87 7/14/93 MOTION by Defendant AT&T FOR SUMMARY JUDGMENT Oral Argument Requested (cvsp) [Entry date 07/15/93]

88 7/14/93 MEMORANDUM IN SUPPORT by Defendant AT&T of MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

89 7/14/93 AFFIDAVIT of Dean L Bateman Jr re MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

90 7/14/93 AFFIDAVIT of Glenn Starr re MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

91 7/14/93 AFFIDAVIT of Darsee R Staley re MOTION FOR SUMMARY JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

99 7/14/93 AFFIDAVIT of Spencer Perry re MOTION FOR PARTIAL SUMMARY JUDGMENT [92-1] (cvsp) [Entry date 07/15/93]

102 7/14/93 STATEMENT OF FACTS by Defendant AT&T in support of MOTION FOR SUMMARY

JUDGMENT [87-1] (cvsp) [Entry date 07/15/93]

104 7/20/93 RULE 220-10 STATEMENT by Plaintiff Central Office Tele (qsdr)

115 8/2/93 STATEMENT OF FACTS by Plaintiff Central Office Tele in support of MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

116 8/2/93 AFFIDAVIT by Plaintiff Central Office Tele of Caroline Marie Hall re MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

117 8/2/93 AFFIDAVIT by Plaintiff Central Office Tele of Jason Oren re MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

118 8/2/93 AFFIDAVIT by Plaintiff Central Office Tele of Gordon Rood re MOTION response [115-1] (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

119 8/2/93 CERTIFICATE OF SERVICE of affidavit [119-1] affidavit [118-1] affidavit [117-1] statement [116-1] MOTION response [115-1] by Plaintiff Central Office Tele (qsdr) [Entry date 08/03/93] [Edit date 08/03/93]

179 10/14/93 MOTION by Plaintiff Central Office Tele TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE

FEDERAL COMMUNICATIONS ACT OF 1934 (qsdr) [Entry date 10/18/93]

180 10/14/93 MEMORANDUM IN SUPPORT by Plaintiff Central Office Tele of MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934 [179-1] (qsdr) [Entry date 10/18/93]

181 10/14/93 AFFIDAVIT by Plaintiff Central Office Tele of Bruce M Hall re MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934 [179-1] (qsdr) [Entry date 10/18/93]

189 10/26/93 AFFIDAVIT by Plaintiff Central Office Tele of Bruce M Hall re MOTION reply [188-1] (qsdr) [Entry date 10/27/93]

204 12/8/93 ORDER by Judge John Jelderks DENYING Plaintiff's MOTION FOR PARTIAL SUMMARY JUDGMENT [92-1] GRANTING in part and DENYING in part MOTION FOR SUMMARY JUDGMENT [87-1] Signed 12/8/93 (counsel notified) (qsdr)

206 12/16/93 RECORD OF PROCEEDINGS before Judge John Jelderks DENYING Plaintiff's MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934 [187-1] GRANTING Defendants MOTION FOR LEAVE TO FILE SECOND

AMENDED ANSWER [184-1], 3 week jury trial set for 6/7/94 (cc: Counsel notified) Court Rptr TenBrook Tapes 633 & 634 (tely) [Entry date 12/29/93]

208 1/13/94 SECOND AMENDED ANSWER and COUNTERCLAIM by Defendant American Telephone & Telegraph [56-1] (qsdr) [Entry date 01/14/94]

366 6/7/94 RECORD OF JURY TRIAL 1st day; Pretrial conference with counsel before Judge John Jelderks GRANTING Defendant's MOTION TO QUASH TRIAL SUBPOENAS [346-1]; DENYING Defendant's MOTION IN LIMINE TO EXCLUDE VIDEOTAPE [249-1]; Jury Trial commences: Venire panel sworn and voir dire conducted; opening statements given by counsel; ORDER DENYING Defendant's MOTION IN LIMINE TO EXCLUDE CERTAIN EVIDENCE REGARDING DEPOSITS [259-1]; Witness sworn and testimony adduced. VOIR DIRE BEGINS JURY IMPANELED JURY TRIAL BEGINS; Trial shall reconvene 8:30, 6/8/94 (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/09/94]

367 6/8/94 RECORD OF JURY TRIAL 2nd day before Judge John Jelderks Continued questioning of Mr. Rood. JURY TRIAL to be continued on 8:30 6/9/94 (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/09/94]

383 6/17/94 MOTION by Defendant American Telephone & FOR DIRECTED VERDICT (qsdr) [Entry date 06/20/94]

384 6/17/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR DIRECTED VERDICT ON COT'S INTERFERENCE CLAIM [383-1] (qsdr) [Entry date 06/20/94]

385 6/17/94 MOTION by Defendant American Telephone & TO STRIKE DAMAGES STUDY, and FOR DIRECTED VERDICT memorandum in support (qsdr) [Entry date 06/20/94]

386 6/17/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR DIRECTED VERDICT ON COT'S BREACH OF CONTRACT AND BREACH OF IMPLIED COVENANT CLAIMS [383-1] (qsdr) [Entry date 06/20/94]

387 6/17/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR DIRECTED VERDICT ON COT'S FRAUD AND "GROSS NEGLIGENCE" CLAIMS [383-1] (qsdr) [Entry date 06/20/94]

390 6/20/94 PRETRIAL ORDER approved by Judge John Jelderks Signed 6/7/94 (qsdr)

400 6/23/94 MOTION by Defendant American Telephone & FOR JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT) (qsdr)

401 6/23/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT) [400-1] (qsdr)

402 6/23/94 AMENDED PROPOSED JURY INSTRUCTIONS by Defendant American Telephone (qsdr)

403 6/23/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & of request for jury instructions numbers 26-30 and 35 (qsdr)

405 6/9/94 RECORD OF JURY TRIAL 3rd day before Judge John Jelderks Witnesses sworn and testimony adduced. Order DENYING Defendant's oral motion to strike testimony re: AT&T lying. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

406 6/10/94 RECORD OF JURY TRIAL 4th day before Judge John Jelderks Witnesses sworn and testimony adduced. Trial shall reconvene at 8:30, 6/13/94. (counsel notified) Court Rptr Kathy Eismann (qsdr) [Entry date 06/27/94]

407 6/13/94 RECORD OF JURY TRIAL 5th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER reserving ruling on Defendant's oral motion to exclude Plaintiff's exhibits 65, 67, 69. Order trial shall reconvene at 8:30, 6/14/94. (counsel notified) Court Rptr Kathy Eismann & Linda McDonald (qsdr) [Entry date 06/27/94]

408 6/14/94 RECORD OF JURY TRIAL 6th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER Helen O'Dell is excused from further jury service. Trial shall reconvene at 8:30, 6/15/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

409 6/15/94 RECORD OF JURY TRIAL 7th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER trial shall reconvene at 8:30, 6/16/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

410 6/16/94 RECORD OF JURY TRIAL 8th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER RESERVING ruling on AT&T's oral motion for the court to take judicial notice of the tariffs. DENYING AT&T's oral motion to strike exhibit #257 and testimony on all future damages. Trial shall reconvene at 8:30, 6/17/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

411 6/17/94 RECORD OF JURY TRIAL 9th day before Judge John Jelderks Witnesses sworn and testimony adduced. ORDER striking all testimony and evidence on Plaintiff's theory of diminution of value. Plaintiff rests. ORDER TAKING UNDER ADVISEMENT Defendant's MOTION TO STRIKE DAMAGES STUDY [385-1] and MOTION DIRECTED VERDICT [385-2]; TAKING UNDER ADVISEMENT Defendant's

FOR JUDGMENT AS A MATTER OF LAW [383-1]. ORDER taking under advisement Defendant's renewed oral motion for the court to take judicial notice of the tariffs. ORDER trial shall reconvene (with counsel only) at 2:30, 6/10/94. Trial shall reconvene with counsel and jury at 8:30, 6/21/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

412 6/20/94 RECORD OF JURY TRIAL 10th day before Judge John Jelderks Oral argument on pending motions. ORDER trial shall reconvene at 8:30, 6/21/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

413 6/21/94 RECORD OF JURY TRIAL 11th day before Judge John Jelderks DENYING AT&T's MOTION TO STRIKE DAMAGES STUDY [385-1] and DENYING AT&T's MOTION FOR JUDGMENT AS A MATTER OF LAW BASES UPON NO EVIDENCE OF DAMAGE [385-2]; GRANTING IN PART & DENYING IN PART AT&T's MOTION FOR JUDGMENT AS A MATTER OF LAW [383-1] as follows: First claim (interference) motion is DENIED, Second claim (fraud) GRANTED, Third claim (gross negligence) GRANTED, Fourth claim (breach of contract) DENIED, Fifth claim (breach of the implied covenant) DENIED. DENYING Plaintiff Central's MOTION TO ADMIT EVIDENCE OF AT&T'S FINANCIAL CONDITION [373-1]. Punitive damages will not be submitted to the jury. ORDER GRANTING AT&T's oral motion

for the court to take judicial notice of the tariffs. Witnesses sworn and testimony adduced. ORDER trial shall reconvene at 8:30, 6/22/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

414 6/22/94 RECORD OF JURY TRIAL 12th day before Judge John Jelderks FINDING MOOT Plaintiff's MOTION FOR EXPEDITED RESPONSE TO SECOND REQUEST FOR ADMISSIONS NO. 29 [393-1] MOOT. ORDER DENYING Plaintiff's oral motion to strike Bershaw's testimony. Trial shall reconvene at 8:30, 6/23/94. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (qsdr) [Entry date 06/27/94]

415 6/24/94 STATEMENT OF AGREED FACTS in Connection with the trial court's charge to the jury (qsdr) [Entry date 06/27/94]

418 6/24/94 JURY INSTRUCTIONS 6/24/94 (qsdr) [Entry date 06/27/94]

421 6/23/94 RECORD OF JURY TRIAL 13th day before Judge John Jelderks Witnesses sworn and testimony adduced. Defendant rests. ORDER DENYING Plaintiff's oral MOTIONS for JUDGMENT as a matter of law (as to the counterclaim). ORDER DENYING Defendants RENEWED MOTIONS FOR JUDGMENT as a matter of law. Closing arguments given. (counsel notified) Court Rptr Kathy Eismann & Liz Meacham (tely) [Entry date 06/28/94]

422 6/24/94 RECORD OF JURY TRIAL 14th day before Judge John Jelderks. Closing argument given by counsel. Jury instructed by the court & retire to deliberate. Lunches for 8 jurors & one bailiff were delivered. Jurors requested & were provided 4 soda pops. ORDER jury shall return at 8:30 am on 6/27 to continue deliberations. (counsel notified) Court Rptr Eismann & Meacham (tely) [Entry date 06/28/94]

423 6/27/94 RECORD OF JURY TRIAL 15th day before Judge John Jelderks. Discussion with counsel re jury note received by Court at 4:40pm on 6/24/94. Written answer to the jury note given to the jury by the Court. Jury returned a verdict in favor of Plaintiff. Jury discharged by the Court from further service. (counsel notified) Court Rptr R Stimler (tely) [Entry date 06/28/94]

424 6/27/94 JURY VERDICT for Plaintiff Central Office Tele against Defendant American Telephone & Telegraph (see file) (tely) [Entry date 06/28/94]

427 7/1/94 FINAL JUDGMENT THAT THE PLAINTIFF CENTRAL OFFICE TELEPHONE INC. RECOVER FROM THE DEFENDANT, AMERICAN TELEPHONE & TELEGRAPH CO, the sum of THIRTEEN MILLION DOLLARS ($13,000,000), with post-judgment interest thereon compounded annually at the federal interest rate of 5.31%; & that the defendant take nothing on its counterclaim, and that the counterclaim is dismissed on the merits; and that Plaintiff recover the costs of this action. (See formal Judgment) Signed 7/1/94

microfilmed 7/1/94 Judge John Jelderks (cc: Counsel notified) (dcap) [Entry date 07/05/94]

435 7/19/94 TRANSCRIPT of (trial) 6/7/94 before Judge John Jelderks: Vol. I - pages 1-193 (Wyke) [Entry date of 07/20/94]

436 7/19/94 TRANSCRIPT of (trial) 6/8/94 before Judge John Jelderks: Vol. II- pages 195-445 (Wyke) [Entry date of 07/20/94]

437 7/19/94 TRANSCRIPT of (trial) 6/9/94 before Judge John Jelderks: Vol. III - pages 446-702 (Wyke) [Entry date of 07/20/94]

438 7/19/94 TRANSCRIPT of (trial) 6/10/94 before Judge John Jelderks: Vol. IV - pages 702-960 (Wyke) [Entry date of 07/20/94]

439 7/19/94 TRANSCRIPT of (trial) 6/13/94 before Judge John Jelderks: Vol. V - pages 961-1214 (Wyke) [Entry date of 07/20/94]

440 7/19/94 TRANSCRIPT of (trial) 6/14/94 before Judge John Jelderks: Vol. VI - pages 1215-1494 (Wyke) [Entry date of 07/20/94]

441 7/19/94 TRANSCRIPT of (trial) 6/15/94 before Judge John Jelderks: Vol. VII - pages 1495-1759 (Wyke) [Entry date of 07/20/94]

442 7/19/94 TRANSCRIPT of (trial) 6/16/94 before Judge John Jelderks: Vol. VIII - pages 1760-1917 (Wyke) [Entry date of 07/20/94]

443 7/19/94 TRANSCRIPT of (trial) 6/17/94 before Judge John Jelderks: Vol. IX - pages 1918-2137 (Wyke) [Entry date of 07/20/94]

444 7/19/94 TRANSCRIPT of (trial) 6/20/94 before Judge John Jelderks: Vol. X - pages 2138-2203 (Wyke) [Entry date of 07/20/94]

445 7/19/94 TRANSCRIPT of (trial) 6/21/94 before Judge John Jelderks: Vol. 11 - pages 2204-2438 (Wyke) [Entry date of 07/20/94]

446 7/19/94 TRANSCRIPT of (trial) 6/22/94 before Judge John Jelderks: Vol. 12 - pages 2439-2712 (Wyke) [Entry date of 07/20/94]

447 7/19/94 TRANSCRIPT of (trial) 6/23/94 before Judge John Jelderks: Vol. 13 - pages 2713-2935 (Wyke) [Entry date of 07/20/94]

448 7/19/94 MOTION by Defendant American Telephone & FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL, or FOR NEW TRIAL OR FOR REMITTITUR Oral Argument Requested (dcap) [Entry date 07/21/94]

449 7/19/94 MEMORANDUM IN SUPPORT by Defendant American Telephone & Telegraph of MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], or FOR NEW TRIAL OR FOR REMITTITUR [448-2] (dcap) [Entry date 07/21/94]

450 7/19/94 AFFIDAVIT of Milo Petranovich MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER

TRIAL [448-1], OR FOR NEW TRIAL OR FOR REMITTTITUR [448-2] (dcap) [Entry date 07/21/94]

451 7/19/94 RECORD OF ORDER by Judge John Jelderks GRANTING MOTION TO ALLOW FILING OF A MEMORANDUM IN SUPPORT OF JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL TO EXCEED PAGE LIMITATION [431-1], GRANTING MOTION TO STAY EXECUTION OF JUDGMENT PENDING POST-TRIAL MOTIONS. [428-1] (counsel notified) (dcap) [Entry date 07/21/94]

458 8/4/94 MEMORANDUM IN OPPOSITION by Plaintiff Central Office Tele re MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], re MOTION FOR NEW TRIAL OR FOR REMITTTITUR [448-2] (kab)

459 8/4/94 DECLARATION by Plaintiff Central Office Tele of James T McDermott in support of memorandum [458-1] (kab)

471 8/26/94 SUPPLEMENTATION TO RESPONSE TO AT&T'S MOTIONS FOR JNOV NEW TRIAL AND REMITTER by Central Office Telephone (kab) [Entry date 08/29/94]

474 8/31/94 RECORD OF PROCEEDINGS (Oral Argument) before Judge John Jelderks FINDING the MOTION TO CORRECT THE RECORD [467-1] moot, Written rulings to follow re MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1] and MOTION FOR

NEW TRIAL OR FOR REMITTTITUR [448-2] (cc: Counsel notified) Court Rptr Tapes 843 844 845 (kab) [Entry date 09/07/94]

475 9/8/94 SUPPLEMENTAL MEMORANDUM IN SUPPORT by Defendant American Telephone & of MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], of MOTION FOR NEW TRIAL OR FOR REMITTTITUR [448-2] (kab)

479 9/13/94 TRANSCRIPT of 8/31/94 before Judge John Jelderks (kab) [Entry date 09/14/94]

480 11/9/94 OPINION re MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1], MOTION FOR NEW TRIAL OR FOR REMITTTITUR [448-2] Signed 11/9/94 by Judge John Jelderks (counsel notified) (kab)

481 11/9/94 ORDER by Judge John Jelderks GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL [448-1] an amended judgment will be entered; CONDITIONALLY DENYING ALTERNATIVE MOTION FOR NEW TRIAL; DENYING MOTION FOR REMITTTITUR [448-2] Signed 11/9/94 notified) (kab)

482 11/9/94 AMENDED JUDGMENT in favor of plaintiff for $1,154,000; interest shall accrue on this amount commencing 7/1/94. Signed 11/9/94 microfilmed 11/9/94 Judge John Jelderks (cc: Counsel notified) (kab)

483 11/10/94 NOTICE OF APPEAL to Court of Appeals by Defendant American Telephone from 7/1/94 judgment, 11/9/94 order & 11/9/94 amended judgment (kab)

500 1/5/95 TRANSCRIPT of 12/16/93 Oral Argument before Judge John Jelderks (kab) [Entry date 01/06/95]

(Counsel list omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.	) Civil Action No. 91-1236JE
Plaintiff,	) AMENDED AND SUPPLEMENTAL
v.	) COMPLAINT FOR TREBLE DAMAGES UNDER THE
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	) ANTITRUST LAWS, AND RELATED STATUTORY AND COMMON LAW CLAIMS
Defendant.	)

JURISDICTION AND VENUE

1.

Plaintiff brings this action against Defendant under §§ 4, 14 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) to recover treble damages for injuries it has sustained as a result of violations by Defendant of § 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) under 28 U.S.C. § 1337; and as a matter of diversity jurisdiction under 28 U.S.C. § 1332(a); and under the principles of pendent jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds $50,000.

2.

Venue is properly laid pursuant to 15 U.S.C. § 78aa and 28 U.S.C. § 1391(a) and (b) in the District of Oregon wherein Defendant is found, transacts business, and has agents. Some or all of the violations which are the subject of this complaint have been and are being carried out in the District of Oregon.

Plaintiff

3.

Central Office Telephone, Inc. ("COT") is an Oregon corporation which has done business in the State of Oregon and nationally, and with its principal place of business in Milwaukee, Oregon. COT is what is described in the trade and by AT&T as a "switchless reseller". COT and AT&T compete in a downstream market consisting of the sale of SDN services to end users. Most of these end users are larger users purchasing such services from AT&T directly. Some of these same direct users may in turn elect to resell all or a portion of the services purchased from AT&T to other end users. COT and other resellers compete in this market by subscribing to a master account with AT&T in the expectation that they will be able to obtain the volume discounts described hereinafter, based upon the total usage of the resellers' aggregate customer accounts. Neither COT nor other non-direct resellers can access any other Virtual Private Line Network facility, nor do Plaintiff or other resellers have the technical or financial ability to duplicate such facility. AT&T itself acts as a reseller in competition with Plaintiff and other resellers by seeking out Plaintiff's existing and prospective customers for itself.

4.

As set forth hereinbefore, AT&T's SDN facilities constitute the only upstream market for Virtual Private Line Networks for resellers such as COT. Access to the Software Defined Network is essential to Plaintiff and other resellers in order to compete with AT&T in the sale of SDN services within the downstream market.

Defendant

5.

American Telephone & Telegraph Company ("AT&T") is a corporation organized and existing under the laws of the State

of New York, with its principal place of business in New York, New York. AT&T owns and operates extensive facilities through access to which it provides telephone communications services nationally.

6.

One such facility is entitled by AT&T "Software Defined Network," or SDN. SDN was initiated by AT&T to provide access to its customers into the Virtual Private Line Network. SDN was designed by AT&T to occupy Virtual Private Line Network, and, for purposes of this action, constitutes the upstream market to which COT and other resellers seek access. By law AT&T is required to provide similar access to competitors in the provision of Virtual Private Line Network services emanating from its Virtual Private line Network facility (SDN).

7.

During all times relevant to this complaint SDN has been for resellers synonymous with the Virtual Private Line Network. AT&T, by virtue of its exclusive control over access to its Software Defined Network facility, controls totally competition by resellers in the downstream market as well as more than 80% of the market for Virtual Private Line Network Services.

8.

A Virtual Private Line Network is a separate digital facility that offers unique features and quality greatly superior to the normal switched type of long distance products. Dedicated connections between each user's switch and AT&T's Point of Presence ("POP") are all digital. This eliminates the need for modems when transmitting data and increases the effective speed from perhaps 9600 bits per second to 56000 bits per second. In addition, a Virtual Private Line Network allows dial

up 56K to any other facility on the network that also has a dedicated facility to the closest POP. This completely changes the economics for multiple user customers who wish to transmit significant amounts of data but cannot justify the high cost of dedicated lines, or facilities, connecting all of the remote locations they wish to access.

9.

By having the dedicated access, generally but not always a T-1 type dedicated access, the end user can also significantly reduce the cost of calls between non-dedicated points in their private network. The Virtual Private Line Network offers a significant and unique array of features that route calls from remote locations to a centralized dedicated location inward through the dedicated facility as well as routing outward calls directly to the carrier's POP. The use of the dedicated facility eliminates the need for the carrier to pay originating or terminating access charges to the local telephone company, creating a substantial savings to the customer as well.

10.

As set forth hereinbefore, AT&T's SDN facilities constitute the only upstream market for Virtual Private Line Networks for resellers such as COT. Access to the Software Defined Network is essential to Plaintiff and other resellers in order to compete with AT&T in the sale of SDN services within the downstream market.

TRADE AND COMMERCE AFFECTED

11.

The relevant geographic market within which SDN services are sold to COT and other resellers is the territorial United States of America. The relevant product market in which COT competes is the downstream market as hereinbefore described, for the provision of the unique SDN services

emanating from AT&T's SDN facilities through direct sale and resale to end users of such services. AT&T is believed to control more than 80% of this market. The amount of interstate commerce involved herein is substantial.

BACKGROUND

12.

In about September of 1989 COT learned that AT&T was offering SDN services, as described in paragraphs 6 through 9 hereinbefore, to persons who would resell such services at a profit both to themselves and to AT&T. In meetings prior to October 25, 1989, AT&T representatives spelled out to COT the details of this service. AT&T outlined a number of options COT could select within SDN, depending upon the amount of minutes per year up to a four year period, COT would select. Option II was of initial interest to COT, which would require COT to aggregate sufficient customers of its own to guarantee to AT&T 2,000,000 minutes per year of usage over the proposed four year period. Compensation under this plan would be in the form of volume discounts as per the following schedule:

Monthly	E.V.P.	U.R.P.	International
$0-$10,0000	0	0	0
$10,000-$15,000	0	5%	0
$15,000-$20,000	20%	5%	0
$20,000-$30,000	20%	5%	5%
$30,001-$300,000	20%	5%	13%
Over $300,000	20%	5%	16%

13.

Further negotiations between COT and AT&T with regard to the SDN COT sought specific responses to the specific questions as a condition precedent to an agreement. These were the representations made by AT&T:

a. AT&T would bill Plaintiff's customers and collect revenues from them, and/or COT to apply towards the billing liability of COT.

b. AT&T has filed a tariff which would provide for the proper functioning of the proffered SDN program when purchased by third parties such as Plaintiff.

c. AT&T would permit use of the SDN Calling Card (Credit Card) and that COT customers could use this card to make calls to any international location as well as originate calls from any "U.S. Direct" country.

d. AT&T would make up the initial printing of SDN Calling Cards with both the AT&T and COT logo printed on them.

e. AT&T would furnish timely "call detail" to COT SDN customers directly when using either the Location-Account Billing Option (LABO) or the Multi-Location Billing (MLB).

f. AT&T could allocate any fixed percentage of a corollary plan entitled the Expanded Volume Plan (EVP) to each of the COT SDN customer locations based on the relative calling volume affected by the EVP.

14.

All of the foregoing representations were false at the time made. Specifically:

a. Paragraph 12a was false in that no billing from October 25, 1989 to date to Plaintiff's customers has been correct, and AT&T has never remitted to Plaintiff any revenues.

b. Paragraph 12b was false in that the program has never functioned properly - in the words of AT&T, "this thing is broke."

c. Paragraph 12c was false in that AT&T provided no calling (credit) card.

d. Paragraph 12d was false in that AT&T provided no initial or any printing of the SDN Calling Card.

e. Paragraph 12e was false in that AT&T failed to provide timely call detail to Plaintiff's customers.

f. Paragraph 12f was false in that although requested by Plaintiff, the allocation described has never been made.

15.

During the precontractual negotiations described in paragraphs 12 and 13 hereinbefore, AT&T failed to make the following material disclosures to COT:

a. That a sales limit would be imposed as to the number of orders which could be placed into service each month.

b. That a security deposit would be required.

c. That the same percentage of discount which COT provided its customers under the EVP had to be similarly applied to COT's URP and International discounts.

d. That call detail reports for individual COT customers would be sent at a later date under separate cover.

16.

On October 25, 1989, COT entered an agreement with AT&T to become AT&T's customer as a reseller of SDN services under Option II. The billing option chosen was Multi-Location Billing. Under this option, AT&T represented that any percentage of the expanded volume discount (EVP), could be awarded to the COT customer and the remaining discount could be allocated to COT. In fact, AT&T never made this allocation.

17.

In November of 1989, COT delivered its logos for the Calling Cards to AT&T. In January, 1990, contrary to prior representations, AT&T refused to permit COT, as well as other resellers, to use the Calling Card. As an alternative, AT&T offered the use of the Network Remote Access ("NRA") card which AT&T represented would enable COT SDN customers

to place calls to any domestic or international location. These representations were false in that all international calls attempted by COT's customers were blocked, and initial domestic call service, including percentage of calls completed, was substandard.

18.

In February of 1990, AT&T represented that a new Tariff option had been filed, but not yet approved, whereby the MLCP plan could be included in conjunction with the SDN. The minutes that would be generated under the MLCP plan would be credited toward the SDN commitment if the proposed Tariff was approved. In addition to this, if the Tariff was approved, AT&T would credit 10% of MLCP all revenues towards the SDN account up through December of 1990. To obtain the swifter connection, equal access and interim savings while awaiting connection to the SDN which AT&T represented would accrue to customers, COT agreed to subscribe to MLCP.

19.

In about March of 1990, AT&T proffered to COT an additional program, Option VI under the SDN. Option VI would require COT to aggregate sufficient customers of its own to guarantee to AT&T 15,000,000 minutes per year of usage over the agreed four year period. The same representations and omissions set forth in paragraphs 12 through 15 were reaffirmed as to Option VI, and were false or misleading for the reasons set forth above. Under Option VI, COT was to receive the following schedule of discounts:

Monthly	E.V.P.	U.R.P.	International
$0-$10,0000	0	0	0
$10,000-$15,000	0	5%	0
$15,000-$30,000	17%	5%	5%
$30,001-$300,000	27%	5%	13%

Over $300,000	27%	5%	16%

Based upon the representations hereinbefore set forth, COT agreed to proceed under Option VI and contracted with AT&T for the services under this Option on or about April 9, 1990.

20.

In May or June of 1990, AT&T advised COT that there was difficulty in getting customers installed on the SDN network. A schedule of window dates was submitted for each month. AT&T represented that customers who were submitted to AT&T by this date would be installed on the network about the 10th to 20th of the second following month.

21.

In April 1990, some customers of COT were finally installed on the SDN network for which COT had contracted. As to these, however, AT&T could not explain to COT which had been installed. The remainder were installed late, most had severe customer verification problems, and some were left being served by their prior carrier. Over a period of four to five months there had been over 200 customer locations submitted to AT&T for installation. Sales personnel had to call customers and ask them to dial the verification numbers on each individual telephone line to determine if that line was on the AT&T system or not. Many of the customers had some numbers on the SDN network but others were on the former carrier. About 30% of the numbers failed to be installed. Some multiple location customers would have some location installed while other locations were not. In short, the representations set forth above were false.

22.

In July and August of 1990, contrary to representations made by AT&T, no new orders submitted by COT were

installed onto the SDN. A majority of COT's MLCP orders were never implemented. To date, AT&T has failed to reconcile multiple billing errors on COT's individual customer accounts. Due to AT&T's failure to implement COT's orders on a timely basis, thousands of calls made by COT's customers are "unbilled toll" or "suppressed billing". In 1991, AT&T notified COT, as well as all other resellers, that all unbilled toll for the years 1989 and 1990 would be forgiven, causing COT to lose revenues based on all billings made during this time frame. In addition, despite repeated requests by COT to AT&T, AT&T failed to rectify incidents of unauthorized changes made in the designated carriers ("slamming") of COT's customers.

23.

In April of 1991, AT&T imposed a 2% rate increase for SDN services. On or about December 16, 1991, AT&T imposed another 2% rate increase. Finally, on or about June 1, 1992, AT&T increased rates on its SDN service by 7%. These rate increases have caused the rates which COT must in turn charge its SDN customers to become noncompetitive and has forced COT to disconnect all of its SDN accounts.

24.

As a result of the misrepresentations and omissions, hereinbefore set forth, and the failure of AT&T to perform the services for which COT had contracted and which AT&T had represented would be effectively performed, COT has been injured, inter alia, in these respects:

a. Lost revenues on MLCP account because of the failure of AT&T to issue orders and install the service within promised time constraints.

b. Lost revenues on SDN account because of errors made in handling orders, placing orders, implementing orders and sending the information to local exchange companies.

c. Lost customers due to billing problems.

d. Lost time of employees.

e. Loss of two sales persons.

f. Lost time in training new personnel to replace lost sales persons.

g. Increased telephone calls due to rectify problems.

h. COT SDN account customers placed on other accounts.

i. Increased billing and mailing costs.

j. Lost sales due to poor referral list.

k. Lost sales time in remedial customer reactions.

l. Vendors and agents becoming inactive due to lost sales commissions.

m. Lost opportunities for new business.

n. Contraction of COT's reasonably expected growth.

o. Restricted cash flow.

p. Damage to the name of COT.

q. Decreased value of the company due to loss of profitability and goodwill.

r. Lost revenues on the SDN account due to rate increases.

q. Lost revenues on MLCP and SDN accounts due to inaccurate billings to COT customers.

FIRST CLAIM FOR RELIEF
(Violations of Section 2 of the Sherman Act--
Attempted Monopolization and Monopolization)

25.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

26.

The false misrepresentations, material omissions, and conduct set forth in paragraph 12 and following, and the constant failure to set up, provision and service Plaintiff's customers within promised or any reasonable time frame, and to perform proper or any accounting for the benefit of COT and

its customers, was part of a deliberate scheme whereby AT&T, in control of access to service and facilities essential to COT's ability to operate its business successfully, rendered such access economically ruinous to COT. This conduct was intended to and did advance AT&T's attempted monopolization and control over SDN in the territorial United States, and excluded COT and other resellers from meaningful competition with AT&T for SDN customers. As an additional tactic in its attempted monopolization, and to consolidate its existing monopoly of the SDN system, AT&T consistently favored its own commercial customers over those of COT as to set up provisioning, service and billing, to the substantial injury of COT and other resellers attempting to compete with AT&T. It is feasible for AT&T to provide access to this essential facility. The resultant injury to COT and to resellers generally was in violation of Section 2 of the Sherman Act.

27.

As a direct and proximate result of AT&T's violations as set forth hereinbefore, Plaintiff has been injured in its business and property in an amount to be determined at trial, but presently estimated to be $4,600,000 said sum to be trebled in accordance with 15 USC § 15, together with Plaintiff's reasonable court costs and reasonable attorneys' fees.

SECOND CLAIM FOR RELIEF
(Violations of ORS 646.705 through 646-730 - Attempted Monopolization and Monopolization under Oregon law)

28.

Plaintiff realleges paragraphs 1 through 27, as though fully set forth.

29.

As a direct result of AT&T's attempted monopolization and monopolization, favoring its direct customers, Plaintiff has been damaged in the sum of $4,600,000, an amount to be trebled, pursuant to ORS 646.780, together with the costs of suit, including necessary reasonable investigative costs and reasonable expert fees, and a reasonable attorney's fee.

THIRD CLAIM FOR RELIEF
(ORS 646.010 through ORS 646.180 - Price Discrimination)

30.

Plaintiff realleges paragraphs 1 through 29, as though fully set forth.

31.

AT&T offered SDN for sale to independent communications businesses such as Plaintiff who can resell SDN by aggregating smaller customers who alone do not use enough long distance services to qualify for volume discounts. AT&T also offered SDN for sale to AT&T's large customers who receive volume discounts by subscribing to purchase large amounts of long distance communication time. AT&T's customers who do not need all of the time purchased for their needs may resell unused portions to other users. Plaintiff is in competition with those customers of AT&T who resell unused portions of their SDN time to others. AT&T is also directly soliciting the customers Plaintiff seeks to aggregate.

32.

AT&T's intentional acts as set forth in paragraphs 12 through 23 hereinabove, prevented Plaintiff from securing volume discounts on SDN for its customers. AT&T discriminated against Plaintiff when it prevented Plaintiff from securing volume discounts on SDN while favoring AT&T, its

direct customers and Plaintiff's competitors in provisioning SDN thereby precluding Plaintiff from obtaining price discounts nominally available to Plaintiff on the offered product.

33.

AT&T's discriminatory conduct, as set forth in Plaintiff's Third Claim, is in violation of ORS 646.080. Plaintiff is entitled to its damages in the amount of $4,600,000, to be trebled, its court costs and reasonable attorneys' fees.

FOURTH CLAIM FOR RELIEF
(Intentional Interference with Contractual Relationships and Prospective Business advantage.)

34.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

35.

AT&T's conduct, as set forth in paragraphs 12 through 23 was intended to and did interfere with COT's contractual relationships with its customers. As a result, many of COT's customers have left COT, and many remaining customers have refused to pay all or portions of their billings for service. In addition, the problems caused by AT&T have been attributed to Plaintiff by many customers and prospective customers, and Plaintiff's prospective business advantage has thereby suffered injury, all to Plaintiff's damage in the sum of $4,600,000. Because this conduct was intentional and in reckless disregard of the rights of COT, COT is entitled to punitive and exemplary damages in the amount of $10,000,000.

FIFTH CLAIM FOR RELIEF
(Misrepresentation and Deceit)

36.

Plaintiff realleges paragraphs 1 through 24 of its complaint as though fully set forth.

37.

AT&T's misrepresentations and misconduct as described hereinbefore, were intentional, and defrauded and misled Plaintiff. AT&T intended that Plaintiff rely upon its fraudulent conduct and misrepresentations, and Plaintiff did so to its damage in the sum of $4,600,000.

38.

As a result of its reckless disregard for Plaintiff's rights, AT&T is also liable to Plaintiff for exemplary and punitive damages in the amount of $10,000,000.

SIXTH CLAIM FOR RELIEF
(Gross Negligence)

39.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

40.

As an alternative claim to Plaintiff's Fifth Claim, the misrepresentations and misconduct described hereinbefore, were grossly negligent, and Plaintiff has been damaged thereby in the sum of $4,600,000.

41.

Plaintiff is entitled to exemplary and punitive damages as a result of AT&T's gross negligence in the amount of $10,000,000.

SEVENTH CLAIM FOR RELIEF

(Negligent Misrepresentation)

42.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

43.

As an alternative to Plaintiff's Sixth Claim, Defendant's misrepresentations and conduct as above set forth hereinbefore, were negligent, all to Plaintiff's damage in the sum of $4,600,000.

EIGHTH CLAIM FOR RELIEF
(Breach of Contract)

44.

Plaintiff realleges paragraphs 1 through 24 as though fully set forth.

45.

On October 25, 1989, COT contracted with AT&T for SDN services as set forth hereinbefore at paragraph 16. As a result of the acts as set forth hereinbefore, Defendant has breached this agreement and those entered into subsequently with respect to MLCP and Option VI. Plaintiff has been ready and able to perform on its part. As a result of Defendant's breach, Plaintiff has been damaged in the sum of $4,600,000.

NINTH CLAIM FOR RELIEF
(Breach of the Implied Covenant of Good Faith.)

46.

Plaintiff realleges paragraphs 1 through 24 and 26 of its complaint. The conduct on the part of AT&T described therein has been in breach of its implied covenant of good faith dealing

within the contracts between itself and COT. As a result of Defendant's breach, Plaintiff has been damaged in the sum of $4,600,000.

WHEREFORE, Plaintiff prays for judgment in its favor as follows:

As to its FIRST CLAIM, the sum of $4,600,000, to be trebled, together with its court costs and reasonable attorneys fees.

As to its SECOND CLAIM, the sum of $4,600,000, to be trebled, together with its court costs and reasonable attorneys' fees.

As to its THIRD CLAIM, the sum of $4,600,000, to be trebled, together with its reasonable costs of investigation, expert costs, court costs and reasonable attorneys' fees.

As to its FOURTH CLAIM, the sum of $4,600,000, and exemplary and punitive damages in the sum of $10,000,000, together with its court costs.

As to its FIFTH CLAIM, the sum of $4,600,000, and exemplary and punitive damages in the sum of $10,000,000, together with its court costs.

As to its SIXTH (alternative) CLAIM, the sum of $4,600,000, and exemplary and punitive damages in the sum of $10,000,000, together with its court costs.

As to its SEVENTH (alternative) CLAIM, the sum of $4,600,000, together with hits court costs.

As to its EIGHTH CLAIM, the sum of $4,600,000, together with its court costs.

As to its NINTH CLAIM, the sum of $4,600,000, together with its court costs.

Respectfully submitted,
BRUCE MacGREGOR HALL, P.C.
By: /s/ Bruce M. Hall
Bruce M. Hall, OSB #54038
JAMES DENECKE & HARRIS
J. Richard Urrutia, OSB #82452
Of Attorneys for Plaintiff

Trial Attorney: Bruce M. Hall

DATED: Jan. 26, 1992.
(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.	) Civil Action No. 91-1236 JE
Plaintiff,	) **PLAINTIFF'S FRCP 15 MOTION TO AMEND ITS SECOND AMENDED COMPLAINT TO ADD CLAIMS UNDER THE FEDERAL COMMUNICATIONS ACT OF 1934**
v.	
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	
Defendant.	

Pursuant to Fed. R. Civ. P. 15, plaintiff moves to amend its Amended and Supplemental Complaint by the addition of a claim for violation of the Federal Communications Act, and deletion of prior dismissed claims. Exhibit A, attached hereto, is the proposed amended complaint.

Dated this 22nd day of October, 1993.

BRUCE MacGREGOR HALL, P.C.

By:/s/ Bruce M. Hall
Bruce M. Hall, OSB #54038
Of Attorneys for Plaintiff

(Counsel list omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	)	
Plaintiff,	)	CV No. 91-1236-JE
v.	)	PRETRIAL ORDER
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	)	
Defendant.	)	

The following Pretrial Order is lodged with the Court pursuant to Local Rule 235-2.

I. NATURE OF THE ACTION

Central Office Telephone ("COT") alleges five claims: Intentional Interference with Contractual Relations and Prospective Business Advantage; Misrepresentation and Deceit; Gross Negligence; Breach of Contract; and Breach of the Implied Covenant of Good Faith. Trial will be to a jury.

II. SUBJECT MATTER JURISDICTION

This Court has subject matter jurisdiction under 28 USC § 1332.

III. AGREED FACTS (* indicates relevance is disputed)

1. Plaintiff Central Office Telephone Company (COT) is an Oregon corporation with its principal place of business in Oregon. During the relevant time period, COT purchased (and

as a reseller resold) AT&T's Software Defined Network ("SDN") services, and as a reseller used the SDN Service to resell long distance telephone service. Any reference to "reseller" hereinafter includes COT.

2. Defendant American Telephone & Telegraph Company now known at AT&T Corp. ("AT&T"), is a New York corporation, with its principal place of business in New York City.

3. * AT&T is a telecommunications common carrier regulated under the Federal Communications Act as well as under various state laws.

4. SDN service is a virtual private line network service which offers a greater number of features compared to traditional long distance telecommunications services.

IV. COT'S STATEMENT OF FACTS

1. Most services involved in this dispute, including MLP, the MLCP promotion, technical, engineering, marketing, consulting, and other support, ordering, implementation and billing are part of the contractual relationship between these parties, but are not governed by SDN or related tariff provisions.

2. SDN and related tariff provisions are not applicable to this dispute by their terms.

3. Separately, no tariff provisions enacted after October 30, 1989 are applicable to or relevant to the contractual relationship for Phase II entered between AT&T and COT on that date; and no tariff provisions enacted after April 9, 1990 are applicable to or relevant to the contractual relationship for Phase III entered

between AT&T and COT on that date. Further, tariff provisions related to SDN resellers after the subject dates were initiated and implemented in bad faith, and so as to injure COT.

4. COT ordered the Multi-Location Billing (MLB) option under SDN from AT&T; but AT&T placed COT on Location Account Billing Option (LABO), and did not provide other specified features, such as the SND calling card.

5. AT&T failed to perform the ordering, provisioning and billing functions of SDN service in timely manner, and in some instances, at all for COT.

6. As to ordering, AT&T failed to give COT proper instructions to process or correct customer numbers, to identify customers, and to take other necessary steps to make implementation and provisioning of SDN service timely and effective.

7. Separately, as to implementation and provisioning, AT&T failed to cause its provisioning service to function correctly and to interact effectively with other SDN procedures, such as billing.

8. As to billing, AT&T variously lost, misapplied and converted COT customers, and because of these failures and these failures described above, had no basis for and did not provide the discount allocation promised under EVP and MLCP.

9. AT&T "parked" COT on Multi-Location Calling Plan (MLCP) because the underlying services promised were not yet provided; but this service too failed through non-application of its promised 10% discount to AT&T; non-crediting against COT's SDN minutes commitment of minutes on MLCP; and non-identification to COT of its MLCP customers.

10. AT&T provided a lower level of the services identified in paragraph 1 to COT than COT was originally provided under its Phase II and Phase VI agreements and than AT&T provided for itself and commercial customers in competition with plaintiff. AT&T also implemented internal disincentives for such services through inadequate training and compensation to personnel involved with SDN resellers.

11. As set forth in plaintiff's Supplemental and Amended Complaint, AT&T materially misstated the services it described to COT in contracting for Phases II and VI of SDN, as well as omitted advising COT of AT&T's unwillingness and inability to provide such services.

12. AT&T deliberately and in bad faith, as directed by CDOC, Product Management and other authorities influencing and directing AT&T policy, programs and actions towards resellers, failed to provide the SDN service contracted for by COT, and misused tariff provisions so as to injure COT and other resellers.

13. AT&T's actions, errors and omissions, as described above and each of them, contributed to the damages to be set forth in plaintiff's damages schedules.

V. AT&T'S STATEMENT OF FACTS

1. Plaintiff Central Office Telephone is an Oregon corporation with its principal place of business in Oregon.

2. Defendant is a federally regulated telecommunications common carrier.

3. Defendant's tariff FCC No. 1 defines the terms and conditions of the service AT&T provides to customers

subscribing to long distance message telephone service (LDMTS).

4. Defendant's software defined network or "SDN" service is a LDMTS.

5. Plaintiff subscribed to SDN service on October 30, 1989, under the terms of the Subscription Agreement executed by plaintiff on that date.

6. Plaintiff was defendant's "customer" as defined by AT&T's tariff FCC No. 1.

7. Before subscribing to SDN, plaintiff knew defendant offered SDN only pursuant to the terms of AT&T's tariff FCC No. 1.

8. Plaintiff considered the terms of AT&T's tariff FCC No. 1 before subscribing to SDN.

9. Plaintiff carefully evaluated SDN service before subscribing.

10. Defendant terminated plaintiff's SDN service on September 30, 1992.

11. Plaintiffs selected multilocation billing (MLB).

12. AT&T's tariff FCC No. 1 permits defendant to require a deposit from customers without an established payment history.

13. Plaintiff knew that AT&T's tariff FCC No. 1 permitted defendant to require a deposit from customers without an established payment history.

14. Defendant placed no limit on the number of orders per month an SDN subscriber could submit in October 1989.

15. In April 1990, defendant implemented a policy limiting to 400 locations per month the number of orders an SDN subscriber could submit.

VI. CLAIMS AND DEFENSES

A. Fourth Claim Relief: Intentional Interference with Contractual Relationships and Prospective Business Advantage.

1. COT contends:

(a) AT&T set out to eliminate COT and other resellers, and to benefit itself and its commercial customers in violation of law by intentionally failing to provide services it had promised for the benefit of COT's customers, including correct ordering procedures and actions; by intentionally delaying provisioning of COT's customers; by intentionally failing to provide proper or any billing to COT's customers; by intentionally slamming and misappropriating COT's customers; by intentionally refusing to make any explanation to COT's customers as to its conduct; and by setting up other roadblocks to COT's and its customers' successful use of SDN; all to COT's injury.

(b) AT&T's intentional interference with COT's contractual relationships and prospective business advantage caused or contributed to the damages to be set forth in plaintiff's damages schedules.

2. AT&T contends:

(a) COT's interference claim fails because there is no evidence that AT&T intended to interfere with COT's contracts with its customers, the SDN end locations, by intentionally creating provisioning problems and billing delays and then intentionally failing to remedy those problems for the purpose of interfering or with the knowledge that interference was substantially certain to occur.

(b) COT's interference claim fails because AT&T did not use improper means of interference.

(c) COT's interference claim fails because AT&T did not act for an improper motive.

B. Fifth Claim for Relief: Misrepresentation and Deceit.

1. COT contends:

(a) AT&T made the following misrepresentations to COT as to AT&T's SDN services as to both Phases II and VI, upon which AT&T knew or reasonably should have known, COT would and did rely:

(i) AT&T would bill COT's customers and collect revenues from them in accordance with instructions from COT in behalf of COT, and remit to COT its designated share of discount.

(ii) AT&T had filed a tariff which would provide for the proper functioning of the proffered SDN program when purchased by third parties such as COT.

(iii) That SDN programs selected by COT under Phase II in October, 1989 and under Phase VI in April, 1990 would

continue in accordance with their stated terms and conditions during the term of each agreement.

(iv) That there would be no deposit.

(v) That there would be no restriction on the number of customers COT could place on SDN.

(vi) That AT&T would permit use of the SDN Calling Card (Credit Card) and that COT customers could use this card to make calls to any international location as well as originate calls from any "U.S. Direct" country.

(vii) That AT&T would make up the initial printing of SDN Calling Cards with both the AT&T and COT logo printed on them.

(viii) That AT&T would furnish timely billings and "call detail" to or for the benefit of COT SDN customers; and would make timely payment to COT.

(ix) AT&T could allocate any fixed percentage of a corollary plan entitled the Expanded Volume Plan (EVP) to each of the COT SDN customer locations based on the relative calling volume affected by the EVP.

(b) AT&T's misrepresentations and deceit caused or contributed to the damages to be set forth in plaintiff's damages schedules.

2. AT&T contends:

(a) October 1989 Subscription Agreement.

(i) AT&T did not make false statements about billing, the tariff, call detail, discount allocation, availability of calling cards, deposits, or the 400 per month limitation implemented in April 1990, prior to COT's decision to subscribe to SDN.

(ii) Incorrect statements about the availability of calling cards were not material to COT's decision to subscribe to SDN.

(iii) AT&T's alleged failure to tell COT that call detail would be sent in a statement separate from the bill or that COT could and/or would be required to post a security deposit were not material to COT's decision to subscribe to SDN.

(iv) In 1989, AT&T placed no limit on the number of end location orders COT, or any SDN subscriber, could submit per month.

(v) COT's fraud claim fails because AT&T did not intend COT to rely on any oral or written statements of AT&T, but rather AT&T intended that COT rely exclusively on the tariff.

(vi) COT's fraud claim fails because COT did not rely, nor had any right to rely on oral or written statements or omissions by AT&T, but rather COT relied and, by law, had the right to rely only on the tariff.

(vii) COT's fraud claim fails because AT&T's oral and written statements or omissions were a not a substantial contributing cause of COT's alleged damages.

(b) April 1990 Subscription Upgrade.

(i) COT's fraud claim fails because there is no evidence that AT&T made false statements about billing, the tariff, call detail, discount allocation, calling cards, deposits, or the 400 per month limitation implemented in April 1990.

(ii) There is no evidence that incorrect statements regarding the calling card were material.

(iii) There is no evidence that AT&T's failure to tell COT that call detail would be sent in a statement separate from the bill or that COT could and/or would be required to post a security deposit was material.

(iv) COT's fraud claim fails because there is no evidence that AT&T intended COT to rely on any oral or written statements of AT&T, but rather AT&T intended that COT rely exclusively on the tariff.

(v) COT's fraud claim fails because there is no evidence that COT relied or had the right to rely on oral or written statements or omissions by AT&T, but rather COT relied and could, by law, rely only on the tariff.

(vi) COT's fraud claim fails because there is no evidence that AT&T's oral and written statements or omissions were a substantial contributing cause of COT's alleged damages.

C. Sixth Claim for Relief: Gross Negligence.

1. COT contends:

All of the grounds set forth in COT's Fourth Claim alternatively amount to gross negligence towards COT and

wilful disregard of its rights, all to COT's injury as set forth hereinbefore.

2. AT&T contends:

COT's claim for "gross negligence" fails to state a separate claim for relief. Rather, this claim is an alternative theory of recovery for fraud, and fails for the reasons set forth in Section B. above. (See, Opinion on Summary Judgment.)

D. Eighth Claim for Relief: Breach of Contract.

1. COT contends:

AT&T breached both its Phase II and Phase VI contracts by:

(a) Failing to provide the options and services COT requested, and AT&T agreed to provide.

(b) Failing to process orders for COT for its SDN customers in a timely and agreed upon manner.

(c) Failing to install and implement SDN for COT for its SDN customers in a timely and agreed upon manner.

(d) Failing to correctly, or at all, bill COT's customers.

(e) All the foregoing to COT's injury, as set forth hereinbefore.

2. AT&T contends:

(a) COT's contract claim is barred by the filed tariff doctrine. COT cannot assert a claim for breach of contract

because the filed tariff doctrine limits the duties and obligations between AT&T and COT to those specified in AT&T's tariff FCC No. 1.

(b) COT does not allege that AT&T violated AT&T's tariff FCC No. 1.

(c) There is no evidence that AT&T violated AT&T's tariff FCC No. 1.

E. Ninth Claim for Relief: Breach of the Implied Covenant of Good Faith.

1. COT contends:

(a) The breaches of contract set forth under D.1. were undertaken in bad faith.

(b) SDN tariff changes were introduced to the detriment of resellers.

(c) In addition, the slamming and misappropriation of COT customers were undertaken in bad faith, all to COT's injury, as set forth hereinbefore.

2. AT&T contends:

(a) COT's good faith contract claim is barred by the filed tariff doctrine.

(b) Under Oregon law, the covenant of good faith and fair dealing cannot be used to impose or imply a duty in addition to or inconsistent with any provision of the underlying contract, and because the terms of the tariff are the exclusive source of the obligations and duties of the parties with respect

to a tariffed service, this claim fails because Oregon law will not imply terms or duties to alter or supplement the tariff terms.

F. Counterclaim.

1. AT&T contends:

(a) COT incurred tariff charges for long distance usage, or "toll charges," and it has an outstanding balance on its SDN account.

(b) Pursuant to AT&T's tariff FCC No. 1 and the parties' subscription agreements, COT is liable for payment for services rendered in the amount of $199,399.86 for toll charges.

(c) Pursuant to the terms of AT&T's tariff FCC No. 1, COT is liable for shortfall charges in the amount of $193,542.96 and minimum service commitment charges of $4,166.77. This amount is calculable according to a formula in the tariff, and if AT&T prevails on its counterclaim for toll charges, the court must enter an amount for shortfall charges in the amount of $193,542.96, on toll charges of $199,399.86. Consideration of the shortfall charges is withdrawn from the jury.

(d) Pursuant to the terms of AT&T's tariff FCC No. 1, COT is liable for termination charges in the amount of $631,169.35. This amount is calculable according to a formula in the tariff, and if AT&T prevails on its counterclaim for toll charges, the court must enter an amount for termination charges in the amount of $631,169.35, on toll charges of $199,399.86. Consideration of the termination charges is withdrawn from the jury.

2. COT contends:

(a) As a matter of law, and of fact, AT&T breached its contract and failed to perform its SDN obligations as promised - a condition precedent to any liability on the part of COT.

(b) AT&T cannot demonstrate factually that there is any foundation for its counterclaim.

(c) AT&T has not provided the basis for its counterclaim.

(d) See Section VIII A.3. infra.

G. First Affirmative Defense: Filed Tariff Doctrine.

1. AT&T contends COT's contract claims are barred by the filed tariff doctrine. The Subscription Agreements specifically provide that the parties' relationship is governed solely by the terms of tariff AT&T FCC No. 1.

2. COT contends:

The filed tariff doctrine is not applicable to the case (Order in Summary Judgment).

H. Second Affirmative Defense: Unconstitutionality of Punitive Damages.

1. AT&T contends:

Punitive damages for speech related conduct violate the Oregon constitution.

2. COT contends:

Punitive damages are constitutional.

I. Third Affirmative Defense: Accord and Satisfaction.

1. AT&T contends:

(a) To the extent any of COT's claims are based on allegations about deficiencies in MLCP service, those claims are barred by the subsequent agreement of the parties. COT and AT&T reached an accord on the amount of MLCP revenue to which COT was entitled and AT&T satisfied the parties' agreement by crediting COT's account in the proper amount.

2. COT contends:

AT&T promised, as part of the prepared accord, that it would pay the above sum in cash or provide meaningful credit. AT&T did neither, but instead applied a "credit" to meaningless and fouled accounting. In any event, the facts relating to the failure of MLCP are admissible as to liability.

VII. OTHER LEGAL ISSUES

VIII. PROPOSED AMENDMENTS TO THE PLEADINGS

A. COT

1. COT proposes the remaining claims in this case be renumbered as follows: Fourth to become First; Fifth to become Second; Sixth to become Third; Eighth to become Fourth; Ninth to become Fifth.

2. The damages should be modified in accordance with COT's damage schedules, which were submitted as plaintiff's exhibits 251-264.

3. AT&T should not be allowed to withdraw from jury consideration its counterclaims for shortfall and termination charges, as well as for minimum service commitment charges, so long as AT&T asserts its contentions under F.1.(c) and (d). AT&T must either dismiss with prejudice these three (3) components of its counterclaim or have them considered by the jury.

B. AT&T

1. AT&T withdraws its counterclaim for shortfall charges from jury consideration.

2. AT&T withdraws its counterclaim for termination charges from jury consideration.

3. AT&T withdraws its counterclaim for minimum service commitment charges from jury consideration.

Submitted by:

BALL, JANIK & NOVACK

By /s/ Bruce M. Hall
Bruce M. Hall, OSB #54038
Of Attorneys for Plaintiff

By /s/ Wayne Hilliard
Wayne Hilliard, OSB #51048
Of Attorneys for Defendant

Dated: June __/__, 1994.

(Certificate of Service omitted in printing)

[ER 1222; Tr. 1029, lines 5-25]
Spencer Perry Testimony

Q. What did Mr. Keith tell you to tell him? I know it's your words, but what did he want you to do?

A. He was looking for a recommendation from, from the aad hoc group to modify SDN to kill arbitrage.

Q. Now, what did Mr. Keith state to you, that caused you tto write down the words that way?

A. What were his exact words?

Q. Well, what did he say, yeah.

A. My recollection is that this meeting came after the, the meeting where I showed him that chart that I had told you about, that showed the different AT&T services, and the percent discounts, and the cost of calls.

Q. This is the arbitrage you were talking about?

A. That's right.

Q. Okay. Would you tell us, though, what Mr. Keith told you, so that you wrote down what you did?

A. He, you know -- well, I don't understand -- are you asking me to tell you specifically what he said, because --

Q. All right. Let me just state it this way. Arbitrage we talked about earlier. You explained that. But to kill arbitrage, did you state the word kill arbitrage?

[ER 1223; Tr. 1030, lines 1-11]
Spencer Perry Testimony

A. I see your point.

Q. Yeah.

A. Well, it was clear to me, after I first showed him that one chart, that he wanted us to somehow -- wanted AT&T to modify SDN, so that we wouldn't have switchless resellers in it. So what we had to do is somehow modify the service offering in a way that we would remove the viability of the service for switchless resellers.

Q. And that was your understanding of what he told you at this meeting?

A. That's correct.

[ER 1381; Tr. 1187, lines 7-25]
Michael Keith Deposition Testimony

Q. Would you state your name, please, sir?

A. Michael George Keith.

Q. Mr. Keith, how are you employed?

A. I am a regional vice-president for AT&T.

Q. How long have you been employed by AT&T?

A. It will be 17 years this summer in June.

Q. What have you done to prepare yourself for testimony in this case?

A. I have worked with my lawyers and reviewed depositions and documents.

Q. I want to know, from your perspective in the company, your areas of responsibility in the spring of 1990, whether SDN resellers were your customers or your competitors?

A. In the spring of 1990, I was responsible and led a sales force that sold to the resellers. So for that responsibility, they were my customers.

Q. And when I asked you that before, until you realized that I had the BSD Today article, you said five times, under oath, that you considered them to be your customers, ...

[ER 1382; Tr. 1188]
Michael Keith Deposition Testimony

... didn't you?

A. That's right.

Q. Now, this is your picture on the front page of Plaintiff's Trial Exhibit 87, is it not?

A. That's correct.

Q. And this is a publication published by AT&T, correct?

A. That's correct.

Q. And it contains an interview with you, right?

A. That's correct.

Q. AT&T people were asking the questions, and you, as a AT&T executive, were answering the questions?

A. That's right.

Q. And the headline is in quotation marks, and that is an accurate quote of what you said, right?

A. Yes.

Q. And what did you say?

A. Resellers aren't alternate channels. They are competitors.

Q. Okay. So you recognized they had both -- they were both competitors?

A. Right.

Q. And --

A. Right.

Q. -- customers, right?

A. Right.

[ER 1767; Tr. 1561, lines 2-25]
Maggie Brennan-Lasard Deposition Testimony

Q. We are here today to take your deposition in connection with the case, because you are someone who has been designated by AT&T as an expert with certain areas of expertise. Did you understand you were designated as an expert?

A. Yes.

Q. Okay. Go to the next page. How long have you worked for AT&T?

A. Twenty-one years.

Q. In the 21 years, have you held various, various positions or worked in various areas of AT&T?

A. Yes, I have.

Q. Can you sort of give me a little thumbnail sketch of your career at AT&T?

A. I worked in the tariffs and cost divisions back in the early, late '70's, middle to late '70's, and from there I moved into what they call the external affairs organization. And from there I moved into we they called the strategic pricing organization or state pricing organization.

Q. State?

A. State pricing organization.

Q. Spell that first word.

A. S-T-A-T-E.

[ER 1774; Tr. 1568, lines 2-19]
Maggie Brennan-Lasard Deposition Testimony

A. The SDN users association is comprised of commercial customers.

Q. Is there anything in the FCC Tariff No. 1 that pertains to billing policies for SDN networks?

A. What do you mean by billing policies?

Q. Yes, ma'am. What I mean is how you bill folks for the time that they spend on the telephone, if they are on a SDN network?

A. You mean the rates that we charge them?

Q. No, I don't mean the rates. I mean how you get them to pay those rates. In other words, sending them a telephone bill. Are there policies that -- as to what kind of bill you will send them, will it be detailed, will it be itemized, et cetera, et cetera?

A. That information is not in the tariff.

Q. Okay. Is there anything in the tariff about provisioning of SDN networks?

A. Not to my knowledge.

(Counsel address omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	) CV No. 91-1236-JE
Plaintiff,	) COT'S RENEWED
v.	) MOTION TO ADMIT
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	) EVIDENCE OF AT&T'S FINANCIAL
Defendant.	) CONDITION
	) (ORS 41.315)

* * *

[Exhibit to Motion]

Following is a review of some requirements and conditions for SDN.

- The average start up for SDN is four months from receit of deposit until first customer is turned up.

- The deposit requirements are based upon the number of annual minute commitment and/or the number of customers on the network.

- No provisioning is started until deposit is received.

- The customer is responsible for all ANI collection and dispute resolution on switched access location.

- AT&T will interface with the end users equipment vendor/technician for customers requiring special access.

- There is currently a limitation of 400 switched access locations that can be added, changed or deleted per SDN per month.

- Dedicated access locations have separate, individual intervals.

- There is a limitation of 70,000 calling card numbers and 125,000 authorization numbers per customer. A bulk issuance agreement is needed for calling card number.

- There is a dedicated AT&T technician assigned to each SDN through the AT&T SDN Control Center in Atlanta, GA.

- Cockroaches and slime and convicts need not apply.

[Exhibit to Motion; original handwritten]

March 6, 1990
Mike Keith Staff Mtg

To Do List

* Profile SDN resellers by every which way (Need to develop standard profile template)
* Segment by resellers
* John Greco charges: looking for recommendation from ad hoc group to modify SDN to kill arbitrage
* Report of SDN results:
  "Sales funnel approach"
  UED & #ORDERS
  in/out/chg

---

* Brimis rpt for each customer (SDN)

MGK 5/6/90

* Optimize as soon as we can - immediately
  Do we do this with resellers?
* Develop productivity / AE on each AE: sales . . . revenue
* Develop plans for SDN targeting & strategy to traditional resellers & deflect cockroaches.

[ER 3247]

AT&T'S REQUESTED JURY INSTRUCTION NO. 28

AT&T's tariff governs all aspects of AT&T's relationship with COT. The tariff specifies that AT&T cannot be held liable for damages of the sort COT seeks here unless you find that AT&T has engaged in willful misconduct. Therefore, you may not award COT damages unless you find that AT&T engaged in wilful misconduct toward COT.

TO THE COURT: AT&T Tariff FCC No. 1, Section 2.3.1.A
(Ex 504, p 3)

Carter v. American Telephone & Telegraph Company,
365 F2d 486, 496 (5th Cir 1966), cert denied
385 US 1008 (1967)

MCI Telecommunications Corporation v. Premium Marketing Systems, Inc.
1992 WL 6693, *2 (ND Ill 1992) (copy attached)

Video Education Career Institute v. American Telephone and Telegraph Co.,
1990 WL 137297, *2 (D Mass 1990) (copy attached)

[ER 3324 through 3338; Tr. 14-41 through 14-54]

JURY INSTRUCTIONS

THE COURT: Counsel, one thing on the agreed facts which I read to the jury, I actually had intended just to read those rather than give them a set. The final set I had were not in a form because of some last-minute pen-and-ink changes. If you have them on a word processor and can plug in those modifications, I'd be happy to give the jury a set of them. It's just that I don't physically have mine in a form that can be done.

So, ladies and gentlemen of the jury, I read those to you. You might or might not be getting a set in writing. Apparently, we didn't have a real clear understanding on that. If it's possible to do that and get them to you, I will.

But it's now your duty to decide the facts and reach your decision. I'll give you a set, so you can each read along with me if you'd like. You'll each have a set of instructions to refer back to later in the jury room to the extent that you would like to.

(clerk handing)

THE COURT: Okay. We'll start, then, with paragraph two. I'll tell you the legal rules which you must follow in reaching your decision. Although you may think the law is or should be different, you are bound by your oath to apply the law that I give to you. Your decision must be based solely on the evidence. Do not allow bias, prejudice, or sympathy to influence you.

The evidence consists of the witnesses' live and deposition testimony, the exhibits you will have in the jury room, and the facts to which the parties have agreed. The comments of the

attorneys are not evidence. If your recollection of the evidence differs from that of the attorneys, rely upon your own memory.

You are the judges of whether the witnesses were telling the truth when they testified. You must presume that each witness told the truth, but you are free to decide otherwise based on the manner in which the witness testified, the character, motive, or bias of the witness, or if there was other evidence which you believe. If you find that a witness intentionally lied in one part of his or her testimony, you're free to disregard anything else that witness said. You are the judges of how much weight a witness's testimony deserves.

In considering testimony, you're permitted to form reasonable conclusions by using your good common sense. You should not decide a fact merely by counting the number of witnesses or exhibits. The testimony of one witness whom you believe is enough to prove any fact in dispute.

There are two types of evidence. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of a certain fact. Proof may be either type or both.

In evaluating the evidence, you may consider the power of each side to produce evidence. If weaker and less satisfactory evidence is offered by either party when it appears to you that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust.

An expert witness may give an opinion on any matter in which that witness has special knowledge, skill, experience, training, or education. You should consider the qualifications

and credibility of the expert witness and the reasons given for the opinions. You are not bound by the opinions. Give them the weight, if any, to which you consider them entitled.

Each party must prove its claims by a preponderance of the evidence. Preponderance of the evidence means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs more heavily, you must resolve that question against the party upon whom the burden of proof rests.

A corporation can act only through its officers, agents, or employees. In this case if any officers, agents, or employees of the parties engaged in conduct as charged against them, such conduct is to be treated as the act of the party if within the scope of such person's authority.

The plaintiff, COT, asserts two claims against AT&T. AT&T denies each claim. I will summarize the claims you'll be required to decide, and then I will instruct you specifically on the law applicable to each claim. First, COT asserts that AT&T breached its subscription agreements in several ways. COT contends that AT&T breached the contract of April 9th, 1990, in one or more of the following respects:

One, by failing to present a service, SDN, which was functional for COT. Two, by failing to support SDN by provisioning in a reasonable manner. Three, by failing to support SDN by installing in a reasonable manner. Four, by failing to support SDN by billing in a reasonable manner. Five, by placing COT on location account billing, LABO, rather than multilocation billing, MLB.

Six, by failing to afford COT international calling capability in a reasonable call completion rate under NRI I. Seven, by failing to allocate discounts as directed by COT between COT and its customers. Eight, by failing to provide timely call detail to COT and its customers. Nine, by requiring a security deposit from COT. And, ten, by failing to provide COT with equal access to SDN.

COT contends that AT&T breached the agreement for MLCP of March 8th, 1990, in one or more of the following respects:

One, by failing to provide a service, MLCP, which was functional for COT. Two, by failing to support its MLCP service by provisioning in a reasonable manner. Three, by failing to support its MLCP service by installing in a reasonable manner. Four, by failing to support its MLCP service by billing in a reasonable manner. Five, by failing to credit minutes used by COT on MLCP to COT's SDN minutes usage commitments. Six, by failing to credit COT with a 10 percent MLCP discount in a reasonable manner, and seven, by failing to provide COT with equal access to MLCP.

Second, in addition to the contract claim, COT asserts that AT&T intentionally interfered with COT's contracts and prospective business relations with COT's customers. COT claims it was damaged as a result of AT&T's conduct in connection with each claim. COT seeks to recover lost profits.

Defendant AT&T denies each of COT's assertions. COT -- or, excuse me, AT&T also makes a claim against COT for charges associated with COT's use of AT&T's long distance service.

I'll first explain COT's breach of contract claim. COT and AT&T had three agreements under which COT agreed to purchase and AT&T agreed to provide certain long distance services. It will be your responsibility to determine the terms and conditions of the agreements. You will also need to determine whether AT&T failed to perform in accordance with the agreements and whether it is liable for failing to perform.

The terms of any applicable tariffs control the duties and rights of the parties. In other words, the parties could not make an agreement that was contrary to the terms of an applicable tariff. In this regard, I instruct you that there is tariff language which limits AT&T's liability. Under that language, AT&T may be liable to COT for breach of contract only if AT&T engaged in willful misconduct. To put it another way, the tariff specifically limits AT&T's potential liability, and COT cannot recover an award of dollar damages on its contract claim in the absence of willful misconduct on the part of AT&T.

Willful misconduct is defined as an intentional act or omission performed either with the knowledge that the act or omission will probably harm someone else, or in a manner that implies reckless disregard of probable consequences to others. In determining the terms and conditions of the parties' agreements, you're to consider the three subscription agreements submitted in evidence as exhibits 39, 66, and 77.

You may also consider any oral statements or written documents which were made or furnished before the parties signed the various agreements if you find that the parties intended that those statements or written materials formed part of their agreements.

* * *

THE COURT: You may also consider any oral statements or written documents which were made or furnished before the parties signed the various agreements if you find that the parties intended that those statements or written materials form part of their agreements. You may consider any statements or written materials furnished after the agreements were signed only to the extent they might be helpful in interpreting the terms and conditions to which the parties agreed.

As part of its breach of contract claim, COT alleges that AT&T breached the implied covenant of good faith and fair dealing. Every contract contains an implied covenant of good faith and fair dealing. In addition to complying with the express terms of a contract, each party has an obligation to deal with the other party to the contract in good faith. A party to a contract performs in bad faith if that party carries out the contract in such a way that it unreasonably and unfairly makes it difficult or impossible for the other party to carry out the contract and receive its benefits.

In its second claim, COT asserts that AT&T intentionally interfered with its business relations and expectations of future business relations with its customers, the end users of its SDN service. In order to prevail on this claim, COT must prove by a preponderance of the evidence, one, that COT had business relations with the probability of future economic benefit. Two, that AT&T was aware of the relationships and expectation of future benefits. Three, that AT&T intentionally interfered with COT's business relations. Four, that AT&T interfered for an improper motive or by using improper means. And, five, that COT suffered economic injury as a result of the interference.

AT&T makes a claim -- it's been referred to here as a counterclaim -- against COT for amounts it claims COT owes pursuant to the terms of the tariff in four parts, toll charges,

termination charges, shortfall charges, and minimum service period commitment charges. COT denies these claims. In order to prevail on any of these claims, AT&T must prove by a preponderance of the evidence that it is entitled to recover these charges from COT.

If you find from the evidence and instructions that either party is entitled to prevail on its claim or claims, then it becomes your duty to decide the amount of its damages. Damages which COT may recover are objectively verifiable monetary losses incurred by COT. In determining the amount of damages, if any, consider the amount of lost profits, past, present and future, sustained by COT because of AT&T's conduct.

One who has suffered damage has a duty to exercise reasonable care to avoid increasing that damage. There can be no recovery for increased damage caused by the failure to exercise such care. You're not to consider the mere fact that I'm instructing you with regard to the measure of damages as an attempt by me to suggest or indicate that you should or should not award damages. That's entirely within your province as jurors to make those decisions in this case.

Your decision must be based on the considered judgment of each of you. All of you must agree with the decision. You must talk with one another with the idea of reaching an agreement if you can do so based on your own judgment. You must each decide the case for yourself, but do not reach a decision until you've impartially considered the evidence in the case with your fellow jurors. Do not hesitate to reexamine your views or change your mind if you become convinced you are wrong, but do not change your mind about the effect or credibility of the evidence solely because your fellow jurors

disagree with you or because you want to reach a unanimous decision.

When you go to the jury room, select a presiding juror. The presiding juror shall preside over the deliberations but has no greater voice than any other juror. A verdict form has been prepared for your use. It will be with you in the jury room. It's a relatively simple form. Omitting the caption, it reads, we, the jury, being duly impaneled and sworn to try the issues in this case return our verdict as follows. Then it has a series of numbered paragraphs.

One, on plaintiff, COT's, claim for breach of contract, we find, and then there are two options for you to check. One reads, in favor of plaintiff, COT, the second reads, in favor of defendant, AT&T.

The second paragraph reads, on plaintiff, COT's, claim for intentional interference with business relations, we find, and, then, again, line to check in favor of plaintiff COT, a line to check in favor of defendant AT&T.

The instructions on the form, then, read if you find in favor of COT on either of the above claims, answer question three. Question three really isn't a question. I note now it's a paragraph. Damages are awarded to COT against AT&T in the amount of blank.

Then there's a paragraph four, reads on defendant AT&T's counterclaim, we find, then again there are two lines to check, one or the other. The first one reads, in favor of AT&T and award damages in the amount of blank. And the second reads, in favor of COT.

And you're to evaluate the claims independently. They overlap. The evidence overlaps, but the claims are separate and distinct claims made each way by each party. So it's certainly theoretically possible that you could find in favor on each party as to each of its claims, you could find against each party on each of its claims, or you could find one way or the other in favor of one and against the other. But, the point being, that you evaluate the claims separately that each of the parties are making against the other, keeping in mind that each of the parties has the burden of proof as to its claims for dollar damages.

When you've reached a unanimous agreement as to your verdict, the presiding juror should fill in, date, and sign the form to state the verdict upon which you unanimously agree. You will then return your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff signed by your presiding juror or by one or more of the jury. Bear in mind that -- also, that you are not to reveal to anyone how the jury stands, numerically or otherwise, on the questions before you until after you've reached a unanimous verdict.

Okay. From this point forward, you will be together. Michelle will make arrangements to have lunch brought in for you. If there are any special problems, be sure and let her know, or there might possibly be someone on duty if she has some brief periods of absence.

I can't in any way comment on the facts in the case. It's entirely up to you to resolve the facts. It is my job, though, to give you proper guidance and to explain the rules to you, and I've attempted to do that in as simple a way as possible in what is a fairly complex case. If I've said anything in the rules of law

here that you think are hopelessly confusing or that, by going back to the jury room and discussing it, reading back through my instructions, you just don't feel that you understand what I've said, I'd be happy to explain that to you in more detail if I said anything that was confusing to you.

[ER 3344; Tr. 14-60, lines 2-25]

Instruction number 28 is a statement of the willful misconduct. And I don't know that there's a distinct difference, but we do object to the failure to give the form as submitted. The authorities are there.

THE COURT: I can't remember if yours really differed in any significant way.

MS. STALEY: Let me take a look.

THE LAW CLERK: It didn't.

MS. STALEY: Let me compare these side-by-side. One minute, Your Honor.

MR. PETRANOVICH: Your Honor, it appears to us that the Court's formulation of willful misconduct standard, which is expressed in four subelements in our requested jury instruction number 29, is adequately reflected in two subelements in the Court's instruction. But we except to the failure of the Court to direct that merely negligent service is not willful misconduct.

MS. STALEY: That was proposed instruction 29, Your Honor.

AT&T takes exception to the failure to instruct in accordance with our proposed instruction number 30, again relating to willful misconduct. And this states the fact mere violation of the tariff is not willful misconduct. And that's related to the -- instruction

[ER 4681]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CENTRAL OFFICE TELEPHONE, INC.,	)	
Plaintiff,	)	CV No. 91-1236-JE
v.	)	VERDICT
AMERICAN TELEPHONE & TELEGRAPH COMPANY,	)	
Defendant.	)	

We, the jury, being duly empaneled and sworn to try the issues in this case, return our verdict as follows:

1. On plaintiff COT's claim for Breach of Contract we find:

__√__ In favor of plaintiff COT.

_____ In favor of defendant AT&T.

2. On plaintiff COT's claim for Intentional Interference with business relations we find:

__√__ In favor of plaintiff COT.

_____ In favor of defendant AT&T.

If you find in favor of COT on either of the above claims, answer question 3.

3. Damages are awarded to COT against AT&T in the amount of $ /13,000,000.00/ .

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4. On defendant AT&T's counterclaim, we find:

_____ In favor of AT&T, and award damages in the amount of $_____.

/s/ In favor of COT.

DATED this 29th of June, 1994.

/s/ Linda C. Fitz-Armstrong
Presiding Juror

(Order List: 522 U.S.)

FRIDAY, DECEMBER 12, 1997

CERTIORARI GRANTED

97-679 AT&T V. CENTRAL OFFICE TELEPHONE

The motion of United States Telephone Association, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply. Justice O'Connor took no part in the consideration or decision of this motion and this petition.